Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. 71-2141

UNITED BONDING INSURANCE COMPANY,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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The Petitioner, United Bonding Insurance Company, surety, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit entered therein on June 30, 1971.

OPINIONS BELOW

The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto. The Order Forfeiting Bail dated December 30, 1968, and Order and judgment entered April 14, 1969, in the United States District Court for the District of Kansas, neither of which are reported, also appear in the Appendix hereto.

JURISDICTION

The judgment of the Court of Appeals for the Tenth Circuit was entered on June 30, 1971. No petition for rehearing was filed. This Court's jurisdiction is invoked under *Section 1254(1)*, *Title 28*, United States Code, and this petition is filed within 90 days and is therefore timely under the provisions of Section 2101(c), Title 28, United States Code, this being a petition to review a proceeding in the nature of a civil action to enforce a bail bond forfeiture entered in a criminal proceeding.

QUESTIONS PRESENTED

1. Should a bail bond forfeiture be enforced by judgment against the principal and his surety for the penal sum therein where the forfeiture was entered because the principal was ruled to be dangerous to others and to the community, and not because of his non-appearance?

2. Is the non-appearance of a principal released on bond excused where the principal is in state custody within the district in which the district court is located, and where the principal was, prior to the judgment, dismissed on those state charges and returned to federal custody?

CONSTITUTIONAL, STATUTORY PROVISIONS AND RULES INVOLVED

Constitution of the United States:

Fifth Amendment: "No person shall . . . be deprived of life, liberty, or property, without due process of law . . ."

United States Code, Title 18:

Section 3143. Additional Bail.

"When proof is made to any judge of the United States, or other magistrate authorized to commit on criminal charges, that a person previously released on the execution of an appearance bail bond with one or more sureties on any such charge is about to abscond, and that his bail is insufficient, the judge or magistrate shall require such person to give better security, or, for default thereof, cause him to be committed; and an order for his arrest may be indorsed on the former commitment, or a new warrant therefor may be issued, by such judge or magistrate, setting forth the cause thereof."

Section 3146(e).

"A judicial officer ordering the release of a person on any condition specified in this section may at any time amend his order to impose additional or different conditions of release: Provided, That if the imposition of such additional or different conditions results in the detention of the person as a result of his inability to meet such conditions or in the release of the person on a condition requiring him to return to custody after specified hours, the provisions of subsection (d) shall apply."

Section 3148: Release in capital cases or after conviction:

"A person (1) who is charged with an offense punishable by death, or (2) who has been convicted

of an offense and is either awaiting sentence or has filed an appeal or a petition for a writ of certiorari, shall be treated in accordance with the provisions of section 3146 unless the court or judge will reasonably assure that the person will not flee or pose a danger to any other person or to the community. If such a risk of flight or danger is believed to exist, or if it appears that an appeal is frivolous or taken for delay, the person may be ordered detained. The provisions of section 3147 shall not apply to persons described in this section: Provided, That other rights to judicial review of conditions of release or orders of detention shall not be affected."

Federal Rules of Criminal Procedure, Title 18, United States Code:

Rule 46. Bail

(a) Right to Bail.

* * *

(2) Upon Review. Bail may be allowed pending appeal or certiorari unless it appears that the appeal is frivolous or taken for delay. Pending appeal to a court of appeals, bail may be allowed by the trial judge, by the court of appeals, or by any judge thereof or by the circuit justice, to run until final termination of the proceedings in all courts. Pending appeal or certiorari to the Supreme Court, bail may be allowed by the court of appeals or by any judge thereof or by the Supreme Court or by a Justice thereof. Any court or any judge or justice authorized to grant bail may at any time revoke the order admitting the defendant to bail.

* * *

(f) Forfeiture.

(1) Declaration. If there is a breach of condition of a bond, the district court shall declare a forfeiture of the bail.

(2) Setting Aside. The court may direct that a forfeiture be set aside, upon such conditions as the court may impose, if it appears that justice does not require the enforcement of the forfeiture.

(3) Enforcement. When a forfeiture has not been set aside, the court shall on motion enter a judgment of default and execution may issue thereon. By entering into a bond the obligors submit to the jurisdiction of the district court and irrevocably appoint the clerk of the court as their agent upon whom any papers affecting their liability may be served. Their liability may be enforced on motion without the necessity of an independent action. The motion and such notice of the motion as the court prescribes may be served on the clerk of the court, who shall forthwith mail copies to the obligors to their last known addresses.

(4) Remission. After entry of such judgment, the court may remit it in whole or in part under the conditions applying to the setting aside of forfeiture in paragraph (2) of this subdivision.

(g) Exoneration. When the condition of the bond has been satisfied or the forfeiture thereof has been set aside or remitted, the court shall exonerate the obligors and release any bail. A surety may be exonerated by a deposit of cash in the amount of the bond or by a timely surrender of the defendant into custody.

STATEMENT OF THE CASE

Rudolph Williams, the defendant below, was charged, tried and convicted of bank robbery. Pending appeal, he was admitted to bond in the amount of $15,000 with the petitioner, United Bonding Insurance Company, as surety, on November 1, 1968. On or after December 13, 1968, the defendant Williams was arrested by officers of the Kansas City, Kansas police department and was held in custody within the United States District of Kansas upon state charges. On December 20, 1968, the United States Attorney for the District of Kansas, who knew of the defendant's arrest and confinement, filed a Motion to Forfeit Bail and Recommit defendant and a hearing was held on that motion in Wichita, Kansas, on December 24, 1968. The defendant had been notified of this hearing but no notice had been served on the surety.

At that hearing the United States Attorney sought to revoke the bail and forfeit the bond under 18 U.S.C. 3148 for the reason that the defendant was a danger to other persons and to the community (Transcript of Proceedings 12/24/68, page 3) and the District Court so found and ordered. (Transcript of Proceedings 12/24/68, page 12). A written order forfeiting the bond and ordering the defendant recommitted was filed on December 30, 1968.

The defendant Williams was discharged by the state authorities after a preliminary hearing on January 8, 1969, and was immediately taken into custody by federal authorities under the Court's order recommitting him.

On March 7, 1969, the United States Attorney filed a Motion for Judgment of Default upon the bond forfeiture. Notice of this motion was served upon the defendant (at the Federal Penitentiary at Leavenworth), his former attorney (who no longer represented the defendant), and

upon the surety. Hearing upon this motion was held on March 24, 1969, at which the defendant and surety failed to appear, and the Court entered a judgment against the defendant and the surety in the sum of $15,000 and a written order was filed on April 14, 1969.

On April 21, 1969, the surety filed its motion to set aside the judgment and forfeiture. A hearing was held on that motion on June 13, 1969, at which time the Court took the matter under advisement and requested briefs be filed. The Surety's brief was filed on July 14, 1969, and the Government's brief was not filed until December 17th. On October 18, 1969, the United States Court of Appeals for the Tenth Circuit affirmed the original conviction of Williams. On April 10, 1970, by letter, the District Court denied Petitioner's motion to set aside the judgment and forfeiture, and the petitioner appealed.

On June 30, 1971, the United States Court of Appeals for the Tenth Circuit affirmed the District Court.

A copy of the bail bond in question is included in the Appendix hereto.

REASONS FOR GRANTING THE WRIT

I

The Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this Court.

The Court of Appeals based its decision upon the following premises: (1) that the defendant (who was known to be in state custody) and the Petitioner-surety (who was not notified) failed to appear at the December 24, 1968, hearing; (2) that the defendant had violated the terms and conditions of his bond by being arrested for other offenses (upon which he was later discharged), a condition not con-

tained in the written terms of the bond; (3) that the defendant (who was then held in federal custody) and the surety failed to appear at the March 24, 1969, hearing; (4) that defendant's non-appearance on December 24th was not excused by his imprisonment by state authorities; (5) that the original forfeiture was entered because of the defendant's failure to appear on December 24th (which was not borne out by the transcript or by the order of December 30th as a basis for the forfeiture); (6) that the surety never offered any reason for its failure to appear on December 24th (when it had no notice) and on March 24th; and (7) that the District Court did not abuse its discretion.

The Court of Appeals thus decided at least two questions that are of vast importance in the administration of law, in a field of law upon which there are few modern decisions and in which the decisions of the various circuits and state appellate courts vary widely.

First. The Court of Appeals has sanctioned the forfeiture of the penal sum of a bail bond and the entry of a judgment against the surety based upon the principal's arrest for state offenses upon which he was shortly afterwards discharged, and not because of the principal's failure to appear for trial, appeal or other proceedings not connected with the bond forfeiture proceedings.

A bail bond is posted to assure the principal's appearance when required and a surety on such bond contracts that the principal will appear but does not contract that the principal will behave. Bonds are not for the purpose of enriching the treasury.

The only non-appearances by the defendant below were in connection with the Government's efforts to forfeit the bond and secure a judgment. In the first instance

of non-appearance the defendant's appearance although not required in the order, could have been secured by means of a writ of habeas corpus ad testificandum, and at the second hearing the defendant was in federal custody under an order of the district court. The proceedings to forfeit the bond because of the principal's conduct was initiated without any notice to the surety, which was ultimately effected by those proceedings in the amount of $15,000. The surety should not be expected to know that its bond would be forfeited at a time when the defendant was not required to appear upon his appeal. It would seem due process would require some notice to the surety under such circumstances.

Section 3148, Title 18, United States Code, authorizes the court to deny appeal bond where it has reason to believe that no one or more conditions of release will reasonably assure that the defendant will not pose a danger to any other person or to the community. Petitioner would submit that where the court acquires that belief after the defendant has been released the appropriate remedy is to revoke the bond. *Sections 3143 and 3146(e),* Title 18, United States Code and Federal Rules of Criminal Procedure, Rule 46(a)(2) provides for such a remedy. That remedy was sought and obtained in this cause. There was no just or legal reason why the penal sum of the bond should also have been forfeited. Judgment was entered after the principal had been recommended to federal custody and the state charges giving rise to the proceedings had already been dismissed.

Second. The Court of Appeals has held that the surety on a bond is not exonerated from liability for the non-appearance of the principal where the principal is prevented from appearing because of his incarceration by state authorities within the jurisdiction of the federal

court. At page 6 of its opinion the Court of Appeals said, "It is the general rule that imprisonment by other authorities does not excuse production of the principal by the surety." This Court in *Taylor* v. *Taintor* (1872) 16 Wall. 366, 83 U.S. 366, 21 L.Ed. 287, laid down the rule that bail is exonerated where performance was rendered impossible by the act of God, of the obligee, or of law. In that case the surety on a Connecticut bond permitted the principal to travel to New York where he was arrested and then removed to Maine under the federal rendition statute. A forfeiture was then entered in Connecticut because of the principal's non-appearance for trial due to his confinement in Maine. The Court there held that the act of law, such as would exonerate the bail, must be law operative in the state where the obligation was assumed.

Other courts have rendered similar decisions. In *Sifuentes-Romero* v. *United States,* (1967) 374 F2d 620, the Court of Appeals for the Fifth Circuit so held where the defendant was incarcerated in Mexico. But see *United States* v. *Burl,* (ED Ill. 1946) 67 F. Supp. 583.

The basis for such holdings was the principal's voluntary act in leaving the jurisdiction of the court and his voluntary act in committing the new offenses. See *Ward* v. *State of Oklahoma ex rel. Carman,* (1947) 196 P2d 856, 4 ALR 2d 436. Neither of these reasons can be said to be true in our present case. The defendant Williams did not voluntarily, or otherwise, leave the territorial jurisdiction of the district court. The defendant was discharged on the state charges at a preliminary hearing so, in view of the constitutional presumption of innocence, it cannot be said that he voluntarily committed the State offenses. It is true that police officers testified at the December 24th hearing regarding the defendant Williams' involvement in those offenses but they were not subject

to cross-examination. In these days of mass arrests, often without any legal basis whatsoever, it would appear to be grossly unjust and out-of-step with the constitutional safeguards to enforce the forfeiture of the penal sum of a bond solely upon the principal's having been arrested by state officials and upon the principal's failure to appear, because of his confinement on those state charges, at a hearing set for the purpose of forfeiting his bond because of that arrest. It would appear to be an outrageous exercise of judicial authority to enforce that forfeiture where the principal, prior to the filing of a motion for judgment to enforce that forfeiture, had not only been dismissed from those state charges but had also been taken into federal custody and confined. To exercise judicial authority in such a manner would be arbitrary and abusive. See *Smaldone* v. *United States,* (1954, CA 10) 211 F2d 161.

It has long been held that an arrest by authorities of the jurisdiction to which the principal gave the bond excuses performance of that bond. See *Re Beavers,* (1904, CC 2nd) 131 F. 366, and *Continental Casualty Co.* v. *New York,* (1952) 111 N.Y.S. 2d 495.

Our trial and appellate courts are becoming more and more clogged with criminal prosecutions. The trend is also towards more liberal release of defendant's prior to trial and upon appeal. It is thus obvious that questions involving bail bonds and the forfeitures thereof will correspondingly increase. Petitioner would submit that the questions presented herein are of such importance to the administration of justice; that this Court should settle the questions presented herein. Petitioner would further submit that the Court of Appeals has sanctioned by the District Court a departure from the usual and accepted course of judicial proceedings and remedies of such magnitude as to call for an exercise by this Court of its power of supervision.

CONCLUSION

For these reasons, a writ of certiorari should be issued to review the judgment and opinion of the Tenth Circuit.

Respectfully submitted,

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